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Before the
Federal Communications Commission
Washington, D.C. 20554

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MAY 30 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Advanced Television Systems	)	MM Docket No. 87-268
and Their Impact upon the	)	
Existing Television Broadcast	)	
Service	)	

To: The Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

PETITION FOR FURTHER NOTICE OF PROPOSED RULE MAKING

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Summary

This Petition urges the Commission to adopt a rule preempting certain state and local government restrictions on the placement, construction and modification of broadcast transmission facilities.

In its *Fifth Report and Order* and *Sixth Report and Order* implementing rules for the provision of digital television service ("DTV"), the Commission has made an historic step to advance free, over-the-air television service. In issuing these orders, the Commission recognized the prominence of broadcast television in American life and the critical importance of converting to digital technology to the future of broadcast television.

By adopting a mandatory and aggressive build-out of DTV, the Commission is taking proactive measures to ensure that DTV is implemented as quickly as possible. However, the ambitious build-out contemplated by the Commission may prove unworkable given existing obstacles presented by state and local governments to the alteration of existing towers and the construction of new ones. As it stands now, broadcasters will face enormous practical and technical challenges in attempting to comply with the Commission's deadlines. Given the obstacles posed by state and local governments, however, it may prove impossible to meet these deadlines.

Over the years, broadcasters have faced considerable difficulties in siting, constructing and modifying broadcast towers. Citizens and local governments have increasingly raised concerns over such issues as RF radiation, interference, tower appearance and tower height. In addition, broadcasters often find themselves in protracted and expensive administrative and legal battles when these issues are raised at the local level. Because these issues are

appropriately matters of comprehensive federal regulation, and because delay in construction authorization jeopardizes the timely build-out of DTV, the Commission has the authority to establish procedural constraints on tower siting requests and to preempt local regulations which conflict with federal policies and interests.

Accordingly, the Commission should complete the task that it started with the DTV orders and adopt a rule preempting state and local regulations which impede the ability of broadcasters to alter or construct broadcast transmission facilities. In adopting such a rule, the Commission should be sensitive to legitimate local interests relating to land use regulation, but it must act to preempt those local regulations which interfere with the federal regulatory scheme. The Commission can take such action by crafting a rule -- such as proposed herein by Petitioners -- which is narrowly drawn to specify the regulations which are preempted and which focuses on procedural aspects of the local regulatory process.

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PETITION FOR FURTHER NOTICE OF PROPOSED RULE MAKING

Pursuant to Sections 1.401 and 1.421 of the Commission's Rules, the National Association of Broadcasters ("NAB") and the Association for Maximum Service Television ("MSTV"),[1] by their attorneys, hereby request the Commission to issue a *Further Notice of Proposed Rule Making* in this proceeding, and, in light of the ambitious construction schedule for digital television ("DTV"), to adopt a rule providing for preemption of state and local land

[1] NAB is a non-profit, incorporated association of television and radio stations and broadcast networks which serves and represents the American broadcast industry. MSTV is a non-profit association of television station owners dedicated to preserving the technical integrity of the television broadcast service. The factual matters contained herein are verified by the attached Engineering Statement of Lynn Claudy attached hereto as Exhibit B.

use and other restrictions on the siting and construction of broadcast transmission facilities[2] in certain circumstances.[3]

I.
INTRODUCTION

A. The Commission Has Mandated Swift Conversion to DTV

This Commission, through a series of orders, has taken bold steps to accelerate the nation's transition to DTV. In these orders the Commission has found that (1) the preservation of access to free, over-the-air television service is a paramount goal of public importance and interest; (2) free, over-the-air television cannot be preserved unless television broadcasters convert to digital facilities; and (3) DTV will not be successful unless conversion is aggressive and swift. Despite these findings, the Commission has failed to take an important step which is necessary to ensure a successful transition to DTV: the Commission must preempt state and local regulations which unnecessarily impede broadcasters' rapid conversion to digital television.

In its recent order adopting rules to implement the Advanced Television Systems provisions of the Telecommunications Act of 1996, the Commission recognized that the

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[2] As used herein, "broadcast transmission facilities" refers to towers, broadcast antennas, associated buildings, and all equipment, cables and hardware used for the purpose of or in connection with federally authorized radio or television broadcast transmissions.

[3] NAB and MSTV believe that the record in this proceeding warrants the prompt issuance of a *Further Notice of Proposed Rule Making* under Section 1.421 of the Commission's Rules, seeking comment on the substance of a proposed preemption rule. In view of the general application of the rule proposed herein, however, the Commission may wish to assign a new general docket number to this matter as well.

paramount goal of DTV is the preservation of free, universal broadcasting service.[4] The Commission stated:

> First, we wish to promote and preserve free, universally available, local broadcast television in a digital world. Only if DTV achieves broad acceptance can we be assured of the preservation of broadcast television's unique benefit: free, widely accessible programming that serves the public interest. DTV will also help ensure robust competition in the video market that will bring more choices at less cost to American consumers. Particularly given the intense competition in video programming, and the move by other video programming providers to adopt digital technology, it is desirable to encourage broadcasters to offer digital television as soon as possible.[5]

This goal recognizes the Commission's statutory mandate to "make available . . . to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service."[6] It is also a reflection of the undeniable fact that "broadcast television has become an important part of American life."[7]

In order to preserve free, over-the-air television, the Commission has recognized that television broadcasters must convert to digital facilities. Digital television "offers the opportunity for broadcast television service to meet the competitive and other challenges of the

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[4] Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, *Fifth Report and Order*, MM Docket No. 87-268, FCC 97-116 (Released: April 21, 1997), ¶ 1 ("*Fifth Report and Order*"). *See also Fourth Further Notice of Proposed Rule Making/Third Notice of Inquiry*, MM Docket No. 87-268, 10 FCC Rcd 10541 (Released: April 21, 1995) ("*Fourth Further Notice/Third Inquiry*"), at 10541.

[5] *Fifth Report and Order*, ¶ 5 (emphasis added).

[6] Communications Act of 1934, as amended, § 1 (47 U.S.C. § 151).

[7] *Fifth Report and Order*, ¶ 19 (citing *Fourth Further Notice/Third Inquiry*, at 10543).

twenty-first century."[8] As the Commission stated in its *Fifth Report and Order* in the Advanced Television Systems proceeding, "[o]nly if DTV achieves broad acceptance can we be assured of preservation of broadcast television's unique benefit: free, widely accessible programming that serves the public interest."[9]

The Commission has further recognized that the conversion to digital television may not be successful unless DTV is implemented aggressively and quickly:

> [D]igital television stands a risk of failing unless it is rolled out quickly. . . . Unless digital television is available quickly, other digital services may achieve levels of penetration that could preclude the success of over-the-air, digital television. Viewers who have leased or purchased digital set-top boxes from competing digital media may be less likely to purchase DTV receivers or converters. If digital, over-the-air television does not succeed, however, viewers will be without a free, universally available digital programming service.[10]

Consistent with this aggressive roll-out of DTV, the Commission is requiring that stations affiliated with ABC, CBS, NBC and Fox networks build digital facilities in the ten largest markets by May 1, 1999.[11] Stations affiliated with ABC, CBS, NBC and Fox in the top 30

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[8] *Id.*, ¶ 1.

[9] *Id.*, ¶ 5.

[10] *Id.*, ¶ 80. *See also id.*, Separate Statement of Reed E. Hundt, p. 9 (emphasis added): "Other media such as DBS, cable, wireless cable, and telcos have or soon will offer all the advantages of digital technology. Unless DTV is available soon, and unless it is available in a way that will attract consumers, it may never be able to catch up to the head-start of its competitors. That is why rapid construction requirements are so important. Unless DTV hits the air running, it will be left in the dust of its competitors. At stake is the viability of our free, over-the-air television system."

[11] *Id.*, ¶ 76.

television markets must construct DTV facilities by November 1, 1999.[12] All other commercial stations must construct DTV facilities by May 1, 2002.[13] Legislation is currently pending in Congress which would, if adopted, codify the FCC's DTV implementation schedule.[14]

B. The Commission's DTV Conversion Schedule Will Require Extensive and Concentrated Tower Construction

The Commission has recognized that many television stations will not be able to construct digital facilities at their present transmitter locations. In its *Sixth Report and Order* in the Advanced Television Systems proceeding, the Commission noted that "existing transmitter sites may not always be available and use of alternative sites must be accommodated to permit DTV operations."[15] In recognition of this fact, the Commission has relaxed its interference criteria to allow broadcasters to locate DTV facilities at any site within a three-mile radius of the existing antenna site coordinates, so long as the station would continue to serve its community of license.[16] In fact, industry estimates show that the level of new construction that will be required by conversion to DTV is unprecedented in the history of the broadcast television. It is expected that 66% of all existing television broadcasters will require new or upgraded towers

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[12] *Id.*

[13] *Id.* Non-commercial stations must convert to DTV by May 1, 2003. In addition to the Commission's mandated roll out, 24 television stations in the top ten markets have committed to construct their DTV facilities within 18 months, and their progress will be reviewed by the Commission every six months. *Id.*

[14] S.R. 705, 105th Congr., 1st Sess. (1997) ("Digital Conversion Act of 1997").

[15] *Sixth Report and Order*, ¶ 102.

[16] *Id.*

in order to support digital television services.[17] Currently, there are about 1400 television towers in the United States.[18] Therefore, it is expected that 1000 of these facilities will need to be either upgraded or have new towers constructed in the conversion to DTV.[19]

Moreover, conversion to DTV will inevitably lead to the displacement of FM antennas from existing TV tower locations. According to the FCC's FM and TV engineering database, there are currently 1,320 FM antennas, or 18% of the total number of FM stations, that are located at the same geographical coordinates as at least one TV antenna.[20] Hundreds, if not the majority, of these FM antennas are co-located with TV antennas and, in many instances, will be forced to relocate as a result of the increased weight and load associated with the new DTV equipment.[21] Conversion to DTV will require the installation of new antennas and cable, both of which will increase the load on already overburdened towers. Because towers cannot take on new equipment when they have reached the limits of their load-bearing capacity, some existing broadcast antennas and associated equipment will have to be relocated. Many FM radio stations will likely fall into this category.

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[17] *See* Engineering Statement of Lynn Claudy, ¶ 7 ("Claudy Engineering Statement") (attached as Exhibit B) .

[18] *Id.*, ¶ 9.

[19] *Id.*

[20] *Id.*, ¶ 19.

[21] *Id.*, ¶ 18.

C. Compliance with the Commission's Aggressive DTV Construction Schedule Is Jeopardized by Practical Constraints on DTV Construction and By State and Local Regulation of Tower Siting and Construction

1. *Technical and Resource Constraints*

The construction of a broadcast tower is a difficult and time consuming task that requires a skilled construction crew, specially fabricated steel, and careful site preparation.[22] The time, effort and expense in placing, constructing and modifying a tower is directly related to the height of the tower. According to industry estimates, approximately 40% of existing television towers are above 1000 in height.[23] Therefore, a large percentage of TV towers are tall towers which are more difficult to construct and modify.

Compounding the difficulty in constructing such towers is the lack of trained construction crews. As noted in a recent article in *The New York Times*, tower construction companies face a daunting challenge:

> For the few companies in the business of building television towers, the prospect of bizarre complications, bureaucratic delays and even fatal mistakes only serve to compound the extraordinary challenge now facing them. Under a federally mandated schedule to usher in digital high-definition television . . . the tower builders are embarking on a crash program across the country to build hundreds of new television towers, at heights up to 2,049 feet, taller than the world's tallest buildings.
>
> The trouble is, across the United States only about a half-dozen crews have the experience and training to put up these towers . . . .[24]

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[22] *See, generally,* Claudy Engineering Statement, ¶¶ 11-15.

[23] *Id.*, ¶ 10.

[24] Joel Brinkley, "Crews Are Scarce for TV's High-Danger Task," *The New York Times*, May 4, 1997, page 1 (attached as Exhibit C).

Although *The New York Times*' estimate of the number of tower crews which are qualified to perform DTV construction appears to be conservative -- the Petitioners believe that there are between 12 and 20 tower crews which are qualified to do tall tower work -- under any view, there are very few specially trained tower crews available to construct the towers needed to convert to DTV.

Given the magnitude of the construction challenge, resources available to complete construction by the required build-out deadlines will be strained to the maximum. For example, extrapolating from the distribution patterns of existing towers, approximately 400 tall towers (i.e., above 1000 feet) and 430 medium towers (i.e., between 300 and 1000 feet) will require construction or upgrading.[25] To this workload must be added routine maintenance, repair activities and emergency replacements which are estimated to require some 40 tower jobs a year. Thus, utilizing the Commission's mandatory construction schedule, in the space of five years, it is expected that approximately 400-800 television broadcasters having facilities on tall and medium towers will need to construct or alter towers in order to accommodate the new digital transmission technology.

On average, construction of a new tower takes six months to complete, while alteration of a tower typically takes three months.[26] Complicating this schedule, of course, are events beyond anyone's control such as supply shortages and extreme weather conditions. For example, in the northern states, the construction season is essentially limited to the Spring, Summer and early Fall, as severe late Fall and Winter weather usually precludes construction

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[25] *See* Claudy Engineering Statement, ¶ 10.

[26] *Id.*

activities.

Suffice it to say that the tower construction industry faces a monumental task in assisting television broadcasters in the conversion to DTV. Current construction resources will be stretched to their limits -- and possibly beyond -- in complying with the Commission's DTV build-out schedule. If construction crews are faced with delays from other factors, such as regulatory delays caused by local land use restrictions which impair the construction or modification of broadcast towers, compliance with the timetable will be very difficult if not impossible to achieve.

2. *State and Local Government Restrictions on Tower Siting and Construction*

Compounding the technical and resource limitations on DTV conversion is an array of obstacles arising from state and local regulation of tower siting and construction. State and local governments have placed an ever-increasing variety of restrictions on the ability of broadcasters to place, construct and modify broadcast towers. These include: (1) requirements for detailed and expensive environmental assessments and reviews; (2) "fall radius" requirements based on a direct relationship to the height of the tower, without consideration of the engineering necessity of such requirements; (3) co-location requirements which do not provide sufficient flexibility in instances where co-location is not possible; and (4) requirements regarding tower marking and lighting.

To make matters worse, broadcasters' efforts to construct new towers or modify existing towers are often thwarted by vaguely-defined concerns about such topics as (1) potential interference with other broadcast signals, cordless telephone reception, television reception and

other reception devices such as church public address systems, (2) asserted detrimental health effects of human exposure to RF radiation, and (3) the appearance of the towers themselves. Not only are broadcasters held to elusive, subjective nonfederal standards but they must also contend with protracted procedural machinations before local zoning officials, boards and commissions, often followed by time consuming litigation.

The following examples are representative of the kind of procedural nightmares that broadcasters face in attempting to modify existing facilities and construct new towers:

* Sutro Tower, Inc.

Sutro Tower, Inc. (Sutro) is the owner and operator of a San Francisco transmission tower that supports ten television stations and four FM radio stations. In the 1980s Sutro sought to add transmitters to accommodate two additional stations. When its contractor applied for a building permit, the City Planning Department determined that the proposed construction required Conditional Use Approval from the Planning Commission. The Commission held public hearings on Sutro's permit application at which neighbors expressed concerns about exposure to RF radiation. When it became apparent that the Commission was likely to deny the permit based on these concerns, Sutro withdrew its application so that it could conduct further educational work in the community. The Commission subsequently adopted a resolution expressing its concern about the impact of RF radiation and providing that it would conduct "discretionary review" of all future applications relating to Sutro Tower.

In light of these regulatory obstacles to modifications of its tower site, Sutro has spent the last five years planning for the addition of DTV antennas to its towers. After several years of laying the groundwork and holding informational meetings with city officials and the public, Sutro sought a determination from the City Zoning Administrator that the addition of DTV antennas would not require modification of Sutro's existing Conditional Use Approval. To obtain this determination, Sutro was required to construct a large scale model of an antenna and suspend it from the tower so that the Zoning Administrator could evaluate the visual impact of the addition. After more than five months, the Zoning Administrator published a letter of determination that the DTV antenna addition would not require an amendment to the Conditional Use Permit.

The tower modification as planned, however, *does* require a building

permit for the necessary structural reinforcement of the tower, antenna installation, electrical improvements and building modifications. Based on its earlier resolution, the Planning Commission will conduct "discretionary review" of, and solicit public comment on, the application, even though the actual work to be done is modest in scale and character.

If this process were not complicated and burdensome enough, the issuance of these permits subjects the project to review under the California Environmental Quality Act. Under this state law, Sutro could prepare a study of the environmental effects of the project and seek a "negative declaration" that the project will not significantly affect the environment. However, because that "neg-dec" process is itself cumbersome and a favorable decision might well be challenged, resulting in protracted litigation, Sutro has voluntarily elected to prepare a full Environmental Impact Report ("EIR").

In January 1996, Sutro hired a consulting firm to prepare the EIR for the City Planning Department. The consultants first prepared a preliminary project description and conducted a literature search on the health effects of exposure to RF radiation. In April 1996 the consultants began work on a critical review of the scientific literature as well as an analysis of the effects of the projected levels of RF radiation in the vicinity of Sutro Tower due to DTV. In September the RF exposure technical report -- a document of well over 200 pages -- was submitted to the Planning Department, which indicated that the document would have to be reviewed by the Public Health Department. Because the Health Department did not have staff with the expertise required to review the report, Sutro was required to pay for another consultant to review the report on behalf of the Health Department.

A preliminary draft of the EIR was submitted in February of 1997. The Health Department consultant produced a list of 45 issues to be addressed, and the Health Department itself came up with another 22 issues. The next month the Planning Department solicited additions to the scope of the EIR from interested parties, including longtime critics of RF exposure.

Sutro plans to submit a revised EIR next month responding to these issues. If accepted by the Planning Department, the EIR will then be published and subjected to a 45-day public comment period and a public hearing held by the Planning Commission; Sutro will then have to file responses to all the issues raised in the public comment and hearing process. It could potentially receive all necessary approvals by September 1997 -- 21 months after this formal process began. Of course, the Commission's decision is appealable to a Permit Appeals Board and the courts, so it is possible that Sutro's conversion to DTV could be delayed even further.

* Jefferson County, Colorado

In Colorado, Jefferson County has adopted highly restrictive zoning regulations relating to telecommunications towers, including those on Lookout Mountain, the principal antenna farm serving the greater Denver area. The regulations prohibit the addition of any new antennas to telecommunications towers where the antennas are (1) more than 200 feet in height above the base of the tower, (2) more than 25 feet in height, or (3) more than 8 inches in diameter. The regulations specifically apply to antennas that would be used for broadcasting DTV. The only avenue available to add such an antenna is to rezone the tower site to a "Planned Development" through a complex local zoning process, which offers no guarantee of success.

Among other things, the County's Planned Development regulations require an applicant to make its tower available for use by other broadcasters for a reasonable rental charge and to provide expert testimony "that no existing telecommunications site is available to accommodate the equipment or purpose for which the tower or increase in height is proposed at a reasonable cost or other business terms." A copy of the Jefferson County regulation governing Planned Development for Telecommunications Towers is attached hereto as Exhibit D.

* Station KWWK-FM, Rochester, Minnesota

In the late 1980s, KWWK-FM in Rochester, Minnesota, sought to construct a new 498 foot tower to upgrade its FM facilities from Class A to C2. The upgrade received necessary approval from the FCC and the FAA, and the station reached agreement with a local landowner to purchase property suitable for the tower. The station then sought a conditional use permit from the Olmsted County Zoning Board for the construction.

In order to obtain the county board approval, KWWK first had to have its application reviewed at a public hearing before the local town board. At that hearing, several members of the community spoke against the application, citing concerns such as (1) poor use of the land by the city, (2) radiation "hazards," (3) and the "eyesore" that would be created by the tower. After much heated debate, the town board voted to recommend that the county board not approve KWWK's application.

KWWK then participated in a public hearing before the county zoning board. Members of the public again spoke against the tower proposal, citing the same concerns expressed to the town board as well as concern with potential interference to TV, radio and telephone service. Based on these concerns, the board voted to reject KWWK's application.

KWWK then appealed the decision to the Olmsted County Board of Commissioners. The station was required to participate in yet another public hearing at which the same concerns were expressed by members of the public. Because of the voluminous technical information presented by both sides concerning matters such as RF radiation and the environmental effects of the construction, the Commissioners voted to table the matter for 30 days.

At the next hearing, KWWK presented testimony from an FCC official concerning the RF radiation and interference concerns expressed by members of the public. Some members of the community continued to oppose the construction, asserting that the tower would be an eyesore, that it was a poor use of the land, that it would cause interference with other services, and that it would emit radiation harmful to humans and animals. Based on these concerns, the Commissioners voted 4 to 3 to reject KWWK's appeal.

KWWK then filed a lawsuit against the county on the grounds that it had improperly denied the station a conditional use permit. After five months, the court issued a decision in favor of KWWK. Finally -- after four public hearings and a lawsuit -- the county was forced to relent and grant KWWK the construction permit, to which it was legally entitled. The total time involved in obtaining this necessary local approval was almost two years.

* Station KZZL-FM, Pullman, Washington

In 1990, the owner of KZZL-FM applied for a conditional use permit to erect a new radio tower on a mountain ridge southeast of Moscow in Latah County, Idaho. The licensee sought permission to construct the tower in order to emit a stronger signal from its existing radio station licensed to Colfax, Washington. The Latah County Zoning Ordinance required, as a condition of issuance of a conditional use permit, a finding by the County Planning and Zoning Commission "[t]hat the proposed development will enhance the successful operation of the surrounding area in its basic community functions or will provide an essential service to the community or region." The Commission conducted a public hearing, made such a finding, and granted the permit. Two persons who owned property near the proposed tower site appealed the decision to the Latah County Board of Commissioners. After a second public hearing, the Board confirmed the decision to grant the permit. KZZL proceeded to erect the tower and began transmission.

The neighboring property owners then appealed the issuance of the permit to state District Court, which, after almost two years, reversed the Board of Commissioners. The District Court found that there was not sufficient evidence to support the Board's finding -- required by the existing ordinance -- that the radio tower would provide an "essential" service to the community. The Idaho

Supreme Court affirmed the decision of the District Court, noting that there was "no evidence that a stronger signal would in any way stimulate the local economy."[27] The Court found that the evidence that "the region is already saturated with radio coverage and advertising availability, and that very few people, if any, would gain employment through this radio tower" militated against granting approval of the construction permit. This finding was, of course, contrary to the FCC's determination, in issuing the construction permit, that the public interest would be served by KZZL's power increase and tower relocation. Finally, the Court cited with approval the "great deal of evidence presented by [the land owners] concerning potential health problems caused by transmission towers."

At this point in the process -- almost four years after the initial application -- KZZL had spent approximately $70,000 on legal fees and was facing an order to cease broadcasting and tear down the tower. However, in the interim Latah County had amended its Zoning Ordinance to remove some the more onerous requirements, so the station owner applied for a *new* conditional use permit. A third public hearing was held and the Zoning Commission again granted the permit. One of the neighboring property owners then filed an action in District Court seeking a writ of mandamus requiring the county to direct that the tower be torn down; injunctive relief against the station owner to stop transmission and remove the tower; and a declaratory judgment that the amended ordinance was invalid. The neighbor also appealed the Commission's new permit decision to the Board, which, after yet another public hearing, affirmed the issuance of the permit. The neighbor then filed another District Court action challenging the issuance of the permit, but stipulated to a stay of that proceeding pending resolution of the previous action.

The District Court granted summary judgment for the county on the mandamus and declaratory judgment causes of action and the neighbor did not seek a hearing on her claim for injunctive relief. The Court subsequently dismissed plaintiff's second suit on procedural grounds. Earlier this year -- almost seven years after the initial permit application -- a new District Judge granted plaintiff's motion to reconsider the dismissal of the permit appeal but stayed the proceeding to allow plaintiff to appeal the summary judgment ruling on mandamus and declaratory judgment. The Idaho Supreme Court has conditionally dismissed the appeal on procedural grounds and a final decision in that case is expected in the near future. If the dismissal stands, the District Court may well reactivate plaintiff's permit appeal and further prolong this saga.

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[27] *Butters v. Hauser*, 125 Idaho 79, 867 P.2d 953 (1993) (attached as Exhibit E).

* Station WHVE-FM, Manatee County, Florida

In the 1980s, WHVE-FM in Manatee County, Florida, went through a lengthy FAA approval for construction of a 1700-foot tower. Following the issuance of a final FAA "Determination of No Hazard" and of FCC approval to build the tower, the station had to go through the difficult process of obtaining from the county a special permit for the site and a building permit to construct the tower. Notwithstanding the FAA determination, aviation interests continued to oppose the tower. Ignoring the opinions of its professional staff, the Manatee County Planning Commission voted unanimously to recommend that the special permit be denied and not be submitted to the County Board of Commissioners. After protracted negotiations, the Planning Commission finally agreed to submit the request to the Board of Commissioners.

The Board of Commissioners grudgingly approved the permit but then instituted a moratorium on tall towers in a further attempt to block the WHVE-FM tower. Faced with the threat of litigation by the station, the county finally issued a building permit for the tower March 1988. These extensive administrative and legal delays added almost two years to the tower siting process.

In addition to these examples, the separate records in the Commission's receive-only satellite preemption proceeding[28] and the over-the-air reception device preemption proceeding[29] are replete with similar examples of state and local efforts to obstruct the construction of FCC licensed and approved facilities.

Despite its ambitious construction schedule in the DTV orders, the Commission has failed to provide television broadcasters with the relief from obstacles, such as are described above,

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[28] Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, *Report and Order*, CC Docket No. 85-87, 59 RR 2d 1073 (Released: Feb. 5, 1986) ("*Receive-Only Satellite Order*") (*see infra* at pages 24-25).

[29] Preemption of Local Zoning Regulation of Satellite Earth Stations, *Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, IB Docket No. 95-59, FCC 96-328 (Released: August 6, 1996) ("*Over-the-Air Reception Devices Preemption Order*").

that is essential to the success of the Commission's DTV timetable. The foregoing examples make painfully clear that the Commission cannot have it both ways: it must either preempt certain types of state and local tower siting regulations or abandon its commitment to a swift conversion to DTV. Because a swift conversion to DTV is, as the Commission has concluded, essential to achieving the objectives of Congress and to meeting the telecommunications needs of the American people, the Commission should take the necessary action to preempt state and local zoning and other land use regulations to the extent that they operate to unreasonably prohibit or delay DTV roll-out and other ongoing broadcast transmission facilities construction.

II.
ARGUMENT

A. The Commission May Preempt Non-Federal Regulations That Frustrate the Achievement of Objectives Within the Commission's Authority

The Supreme Court has consistently recognized the broad authority of the Commission and other federal agencies to preempt non-federal regulations. In *City of New York v. FCC*, 486 U.S. 57 (1988), the Court explained:

> When the Federal government acts within the authority it possesses under the Constitution, it is empowered to pre-empt state laws to the extent it is believed that such action is necessary to achieve its purposes. The Supremacy Clause of the Constitution gives force to federal action of this kind by stating that 'the Laws of the United States which shall be made in Pursuance' of the Constitution 'shall be the supreme Law of the Land.' U.S. Const. Art. VI, cl.2. The phrase 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization.[30]

[30] 486 U.S. at 63.

The Court has on many occasions emphasized that state and local regulations may be preempted not just by Congress, but also by "a federal agency acting within the scope of its congressionally delegated authority."[31]

The authority of this Commission to preempt state and local regulations has been affirmed by the Supreme Court and lower federal courts on many occasions and in a variety of contexts.[32] In addition, this Commission has, in other proceedings, recognized its authority to preempt state and local regulations, specifically including zoning and land use regulations.[33]

These decisions establish a two-pronged inquiry for determining whether a federal agency has the power to preempt nonfederal regulation. First, is the agency pursuing an objective that is "within the scope of its congressionally delegated authority"?[34] And second, does non-federal

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[31] *Id. (quoting Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-69, 106 S. Ct. 1890, 90 L.Ed.2d 369 (1986)). *See also Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153 (1982)("Federal regulations have no less preemptive effect than federal statutes.")

[32] *See, e.g., City of New York v. FCC*, 436 U.S. 57 (1988) (preemption of more stringent local regulation of cable TV signal quality standards upheld); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 104 S.Ct. 2694, 81 L. Ed.2d (1984)(Oklahoma ban on cable TV alcoholic beverage adverting preempted by Commission); *New York State Commission on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984) (preemption of state and local entry regulation of SMATV upheld); *New York State Commission on Cable Television v. FCC*, 669 F.2d 58 (2d Cir. 1982) (preemption of state and local entry regulation of MDS upheld).

[33] *See* Preemption of Local Zoning Regulation of Satellite Earth Stations, *Notice of Proposed Rule Making*, IB Docket No. 95-59, FCC 95-180, 2 CR (Pike and Fisher) 2175 (Released: May 15, 1995); Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, *Report and Order*, CC Docket No. 85-87, 59 RR 2d (Pike and Fisher) 1073 (Released: Feb. 5, 1986); *Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities*, 50 Fed. Reg. 38813 (Sept. 25, 1985).

[34] *Louisiana Public Service Comm'n v. FCC*, 476 U.S. at 369.

regulation "stand as an obstacle to the accomplishment and execution"[35] of that objective? When this test is applied to the present matter, there can be no question that the Commission has the requisite authority to preempt state and local land use regulations to the extent that they interfere with the federal interests in ensuring that broadcasters are able to reach their audiences and make a swift and effective transition to DTV.

1. *The Commission Is Acting Within Its Congressionally Delegated Authority In Ordering a Swift Conversion to DTV*

As the Supreme Court has held, Congress has given the Commission "broad responsibilities to regulate all aspects of interstate communication by wire or radio by virtue of § 2(a) of the Communications Act of 1934, 47 U.S.C. § 152(a) . . .."[36] The Commission's authority extends to all regulatory actions necessary to ensure the achievement of the Commission's statutory responsibilities.[37]

The Commission has also recognized the broad, comprehensive nature of its delegation of authority from Congress. In preempting local zoning regulations restricting the use of receive-only satellite antennas, the Commission cited its broad power under Section 1 and Title III of the Communications Act:

> [T]he broad mandate of Section 1 of the Communications Act, 47 U.S.C. § 151, to make communications services available to all

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[35] *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L. Ed. 581 (1941). *See also Michigan Canners and Freezers Ass'n, Inc. v. Agricultural Marketing and Bargaining Bd.*, 467 US 461 (1984); *Florida Avocado Growers v. Paul*, 373 US 132 (1963).

[36] *Capital Cities*, 467 U.S. at 700, *quoting U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 88 S. Ct. 1994, 20 L.Ed.2d 1001 (1968).

[37] *Capital Cities*, 467 U.S. at 700, *quoting FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

> people of the United States and the numerous powers granted by Title III of the Act with respect to the establishment of a unified communications system establish the existence of a congressional objective in this area.

As authorized by Title III of the Communications Act, the Commission has established a pervasive licensing scheme for broadcast communications. Thus, the nature of the subject matter and the complex network of federal regulation indicates that interstate communications "by wire or radio" is a subject matter that the federal government has plainly manifested its intent to regulate.

In its notices, orders and rules on DTV, the Commission has clearly expressed its judgment that swift conversion to digital technology is essential to maintaining the efficiency and effectiveness of the country's communications system and to making that system available to the general public through broadcast television. In its *Fifth Report and Order* the Commission observed:

> Because of the advantages to the American people of digital technology -- both in terms of services and in terms of efficient spectrum management -- our rules must strengthen, not hamper, the possibilities for broadcast DTV's success.[38]

The Commission went on to state that its objectives in adopting the order were "to promote and preserve free, universally available, local broadcast television in a digital worl[d] . . . to help ensure robust competition in the video market that will bring more choices at less cost to American consumer[s, and] . . . to promote spectrum efficiency and rapid recovery of spectrum" so that it can be reallocated or reassigned.[39]

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[38] *Fifth Report and Order*, MM Docket No. 97-268, ¶ 3.

[39] *Id.*, ¶¶ 5-6.

Achievement of these objectives is among the most fundamental responsibilities delegated to the Commission by Congress. There can be no question that Congress has delegated to the Commission the authority to direct a swift conversion to DTV and to do so in a manner that the Commission deems necessary to achieve that objective. Indeed, in Section 201 of the Telecommunications Act of 1996, Congress implicitly recognized the Commission's authority over DTV by constraining the Commission's discretion in awarding DTV licenses and determining the legal parameters of such service.[40]

Congress' failure to specifically provide for preemption of local land use regulations insofar as they pertain to broadcast transmission facilities does not diminish the Commission's authority over, or preclude the Commission from preempting certain aspects of, this subject matter. Although Congress has provided for specific preemption authority with respect to PCS antennas,[41] this explicit Congressional preemption is a reflection of preceived exigencies with PCS service and should not be interpreted to reduce the Commission's existing statutory authority with respect to other services; instead, it is clear that the Commission can preempt state and local regulations to the extent that they interfere with the Commission's regulatory scheme established pursuant to that authority. While it is true that ultimate authority with respect to zoning and land use matters is traditionally reserved to local government, the adoption of a narrowly targeted preemption policy will not take away the fundamental local government authority over zoning and land use matters but will instead direct the exercise of that authority

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[40] The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 201 (1996) ("1996 Act") (*codified at* 47 U.S.C. § 335).

[41] *See* 1996 Act, § 704 (amending 47 U.S.C.§ 332(c)).